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Phang Shyue Ming v Couture Homes Sdn Bhd

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-108–02 OF 2016
ROZANA ALI JC
30 OCTOBER 2016

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Civil Procedure — Striking out — Writ and statement of claim — Plaintiff brought action against defendant claiming ownership of commercial unit in project developed by defendant — Defendant filed application to strike our plaintiff's writ and statement of claim under O 18 r 19(1)(a), (b) or (d) of the Rules of Court 2012 — Whether defendant fulfilled contractual obligation under sale and purchase agreement — Whether plaintiff's claim obviously unsustainable, frivolous, vexatious and abuse of court's process

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Land Law — Ownership — Claim for — Plaintiff brought action against defendant claiming ownership of commercial unit in project developed by defendant — Defendant filed application to strike our plaintiff's writ and statement of claim under O 18 r 19(1)(a), (b) or (d) of the Rules of Court 2012 — Whether defendant fulfilled contractual obligation under sale and purchase agreement — Whether plaintiff's claim obviously unsustainable, frivolous, vexatious and abuse of court's process — Rules of Court 2012 O 18 r 19

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The plaintiff was the purchaser for one of the commercial units known as 'Parcel No 30' ('LG-30') in a project developed by the defendant. Problem arose when the plaintiff found that the defendant had substituted LG-30 with another unit known as 'LG-29'. Consequently, the plaintiff brought an action against the defendant claiming ownership of LG-30. In response, the defendant filed a notice of application to strike out the plaintiff's claim ('the defendant's application') under O 18 r 19(1)(a), (b) or (d) of the Rules of Court 2012. The defendant submitted that they had fulfilled its contractual obligation under the sale and purchase agreement ('SPA') by giving the LG-29 with the similar size to the plaintiff after the building plan had been amended subsequent to the signing of the SPA. It must be noted that, based on the amended building plan, the original location of the LG-30 which was purportedly bought by the plaintiff had been replaced by 'Switch & Meter Room' and staircase. The defendant further submitted that the plaintiff's claim was obviously unsustainable, frivolous, and vexatious and it was an abuse of the court's process. Thus, it was submitted that the writ and statement of claim should be struck out or set aside forthwith.

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Held, allowing the defendant's application with costs of RM5,000:

(1) The amendment and substitution of LG-30 by the defendant was meant for expedient and necessary purpose since the building plan had been approved by MPPJ and the original LG-30 was no longer in existence. Clause 10.1 of the building plan permits the defendant to substitute the plaintiff's unit to another unit. Thus, such amendment and substitution was meant for 'expedient or necessary' purpose and did not amount to an unjust enrichment by the defendant. Further, the plaintiff was not bona fide when claiming LG-30 which was a bigger unit compared with the original unit purchased by the plaintiff and it was an unjust enrichment on the part of the plaintiff (see paras 16 & 19).

(2) It is a settled law that both parties are bound by the terms of the contract that they have entered into. In the present case, the defendant had fulfilled its contractual obligation under the contract by giving LG-29 with almost similar size to the plaintiff after the building plan had been amended subsequent to the signing of the SPA. In totality, the plaintiff's claim was frivolous or vexatious, did not disclose any reasonable cause of action and/or was an abuse of the court's process and was therefore obviously unsustainable (see paras 21–22).

[Bahasa Malaysia summary

Plaintif adalah pembeli untuk salah satu daripada unit komersial yang dikenali sebagai 'Parcel No 30' ('LG-30') dalam projek yang dimajukan oleh defendan. Masalah berbangkit apabila plaintif mendapati bahawa defendan telah menggantikan LG-30 dengan unit lain yang dikenali sebagai 'LG-29'. Akibatnya, plaintif membawa tindakan terhadap defendan menuntut milikan terhadap LG-30. Dalam menjawab, defendan memfailkan notis permohonan untuk membatalkan tuntutan plaintif ('permohonan defendan') di bawah A 18 k 19(1)(a), (b) atau (d) Kaedah-Kaedah Mahkamah 2012. Defendan berhujah bahawa mereka telah memenuhi tanggungjawab kontraktual mereka di bawah perjanjian jual beli ('PJB') dengan memberi LG-29 dengan saiz yang sama kepada plaintif selepas pelan bangunan telah dipinda selepas menandatangani PJB tersebut. Ia mesti diambil perhatian bahawa, berdasarkan pelan bangunan yang dipinda tersebut, lokasi asal LG-30 yang mana didakwa dibeli oleh plaintif telah digantikan oleh 'Switch & Meter Room' dan tangga. Defendan selanjutnya berhujah bahawa tuntutan plaintif adalah jelas tidak boleh dipertahankan, remeh, menyusahkan dan ia adalah penyalahgunaan proses mahkamah. Oleh itu, ia dihujahkan bahawa writ dan pernyataan tuntutan patut dibatalkan atau diketepikan dengan serta merta.

Diputusakan, membenarkan permohonan defendan dengan kos sebanyak RM5,000:

(1) Pindaan dan penggantian LG-30 oleh defendan adalah dimaksudkan

untuk tujuan wajar dan perlu memandangkan pelan bangunan telah diluluskan oleh MPPJ dan LG-30 asal tersebut bukan lagi wujud. Klausa 10.1 pelan bangunan membenarkan defendan menggantikan unit plaintif kepada unit yang lain. Oleh itu, pindaan dan penggantian sedemikian adalah bermaksud bagi tujuan 'expedient or necessary' dan tidak merupakan pengkayaan tak patut oleh defendan. Selanjutnya, plaintif adalah tidak suci hati apabila menuntut LG-30 yang mana adalah unit yang lebih besar berbanding dengan unit asal yang dibeli oleh plaintif dan ia adalah pengkayaan tak patut oleh pihak plaintif (lihat perenggan 16 & 19).

(2) Adalah undang-undang nyata bahawa kedua-dua pihak adalah terikat dengan terma-terma kontrak yang dimasuki mereka. Dalam kes ini, defendan telah memenuhi tanggungjawab kontraktualnya di bawah kontrak dengan memberikan LG-29 dengan saiz yang hampir-hampir sama dengan plaintif selepas pelan bangunan telah dipinda selepas menandatangani PJB tersebut. Secara keseluruhannya, tuntutan plaintif adalah remeh atau menyusahkan, tidak mendedahkan apa-apa kausa munasabah dan/atau penyalahgunaan proses mahkamah dan oleh itu jelas tidak boleh dipertahankan (lihat perenggan 21–22).]

Notes

For cases on claim for ownership, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 4235–4246.

For cases on writ and statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 9046–9062.

Cases referred to

Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor [2011] 7 MLJ 52, HC (refd)

Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Sdn Bhd [2010] 1 MLJ 329, HC (refd)

Malayan Banking Bhd v PK Rajamani [1994] 1 MLJ 405, SC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(d)

Mohd Hafarizam (Her Lerk Yau and Nurshafiqa Balqish with him) (Hafarizam Wan & Aisha Mubarak) for the plaintiff.

Justin Voon (Alvin Lai and Lin Pei Sin with him) (Justin Voon Chooi & Wing) for the defendant.

Rozana Ali JC:

[1] This is a notice of application (encl 5) by the defendant to strike out the plaintiffs' claim under O 18 r 19(1)(a), (b) or (d) of the Rules of Court 2012. The plaintiff has also filed an application for an interlocutory injunction (encl 8) but was later withdrawn.

[2] The plaintiff is the purchaser for one of the commercial units in the project known as Empire Subang and the defendant is the developer and vendor of the said project. On 26 July 2007, the parties executed a sale and purchase agreement ('SPA') which includes the deed of mutual covenant ('DMC') for the purchase of the parcel unit described as 'Parcel No 30' in the SPA.

[3] The plaintiff claimed that the defendant had unilaterally and without the plaintiff's knowledge unlawfully changed and/or substituted the parcel with a different unit ie LG-29. The plaintiff is now seeking relief from the court against the defendant for:

(a) a declaration that the SPA, the DMC and the option agreement dated 26 July 2007 ('GRR') were binding and enforceable between the parties;

(b) a declaration that the plaintiff is the rightful and valid legal and beneficial owner of present LG-30 and the plaintiff's ownership of LG-30 is indefeasible;

(c) a declaration that the change and/or substitution of LG-30 in the name of the defendant is invalid, void and unenforceable; and

(d) an order for damages, aggravated and/or exemplary damages to be awarded and assessed by the court to be paid by the defendant to the plaintiff for the alleged, breach of the contracts, breach of trust and/or fraudulent acts purportedly perpetrated against the plaintiff and for interest and cost.

[4] The plaintiff in objecting the defendant's application to strike out its' claim had raised the following issues:

(a) the parcel should be 'LG-30' and not 'LG-29'; and

(b) the 'Parcel No 30' in the SPA has been purportedly substituted in the name of the defendant without the plaintiff's knowledge and consent.

[5] The defendant submitted that the parcel is defined as 'one of the units' situated in the retail outlets/the shopping mall. Clause 1.1(j) of the SPA defines 'Parcel' means one of the units situated in the retail outlets described in Part II of the Fifth Schedule hereto. In other words, as long as one of the units situated

in the retail outlets is given to the plaintiff, the defendant has fulfilled its contractual obligation. The defendant has the right to, inter alia, amend, vary, substitute, extend, expand, reconstruct and/or any manner deal with the parcel without the need to seek consent from the plaintiff. The building plan is subject to changes, variations and modifications and the plaintiff as the purchaser shall accept any such changes, variation, modification and any adjustment of the parcel.

[6] The defendant also submitted that the floor plan annexed in the SPA and details shown therein is only be for the purposes of identification and no warranty or condition shall be given in respect from such floor plan or details shown therein. The parcel is one of the commercial units and not residential unit. Furthermore, the position and description of the parcel are not guaranteed to be correct. In fact the plaintiff has agreed as in the SPA that the location and description of the parcel is subject to change, substitution or modification based on the absolute discretion of the defendant. Based on the clear terms of the SPA including the DMC, the plaintiff has no merit to support his claim.

[7] On the other hand, the defendant has fulfilled its contractual obligation by giving the LG-29 with the similar size to the plaintiff after the building plan has been amended subsequent to the signing of the SPA. In fact the plaintiff had by his own conduct admitted and acknowledged that LG-29 located in the shopping mall is the parcel belonging to the plaintiff. He is not entitled to claim for LG-30 which is a much bigger in size located further away from the original location of the parcel. Therefore there is no breach of contract or fraud or breach of fiduciary duty by the defendant.

[8] It is the defendant's submission that the plaintiff's claim is obviously unsustainable, frivolous, and vexatious and it is an abuse of the court's process. The writ and statement of claim should be struck out or set aside forthwith.

[9] The plaintiff submitted that the defendant had unilaterally and without the plaintiff's knowledge unlawfully changed and/or substituted the parcel with a different unit ie LG-29. The plaintiff insisted for LG-30 not LG-29 for reasons that the notice of delivery of vacant possession dated 8 October 2009 was issued to the plaintiff in respect of LG-30 and the plaintiff took possession of LG-30 only. The certificate of fitness was also duly issued to the plaintiff for LG-30 and not any other units.

[10] On the other hand the defendant explain that the parcel described as LG-30 in the SPA had been relocated and re-designated as LG-29 due to the amendment to the building plan on 4 August 2009 under the reference No MPSJ/BGN/KW/ A-9/6) and was also approved by MPSJ (exh 'CJY3' of

affidavit in support). Thereafter, 'Sijil Layak Menduduki' (exh 'H' of the second affidavit in reply) has been issued by MPSJ to certify the completion of the building in accordance with 'Pelan Kelulusan No A 9/6' approved on 4 August 2009 with reference to 'MPSJ/BGN/KW/A-9/6'.

[11] Based on the amended building plan, the original location of the LG-30 has been replaced by 'Switch & Meter Room' and staircase. The location of LG-29 on the amended building plan is the nearest and next to the original location with the similar size of the parcel was allocated to the plaintiff.

[12] The plaintiff is now claiming for LG-30 in the amended building plan which is not only further from the original location of the parcel, but is also a much larger unit measuring 1272 sqft as compared to the original size of the parcel unit bought by the plaintiff which 903 sqft.

[13] The defendant contended that as the vendor, it is entitled from time to time to make such amendment, variation, or substitution in the building plan as determined absolutely by the defendant. The word 'substitution' also indicates that the defendant is entitled to even substitute the parcel with another unit. The defendant relied on Recital (C) of the SPA:

> (i) Recital (C) of the said Agreement:–
>
> (C) The Vendor shall at its own cost and expense, obtain the approval of building plans (hereinafter referred to as 'the Building Plan') from the Appropriate Authority. A copy of the Floor Plan, Storey Plan and Site Plan as certified by the Vendor's Architect are annexed in the FIRST SCFIEDULE hereto. The Purchaser hereby acknowledges that the Purchaser has inspected and accepted the same prior to or upon the execution of this Agreement and hereby confirms that the Vendor shall be entitled from time to time to make such amendments variations or substitution thereto as may be required by the Appropriate Authority or as determined absolutely by the Vendor and/or the Vendor's consultants or architects.

[14] Clause 3.1 of the SPA stipulates that any amendments, variations or substitutions thereto (ie done to Lot LG-30) may only be done 'as may be required by the Appropriate Authority' or 'as may be determined absolutely by the Vendor and/or the Vendor's consultants who shall consider expedient or necessary'. In other words this clause provides that the defendant as the vendor is entitled to amend, vary or substitute at the defendant's discretion where it considered expedient or necessary.

[15] In addition, cl 10.1 of the SPA stipulates that it is expressly agreed and declared that the position and area of the parcel in relation to the other parcels as shown in the building plan and stated in this agreement are believed to be correct. It is further expressly agreed that the building plan are subject to such changes, variations and modifications and the purchaser shall accept any such

changes, variations and modifications and any adjustment of the parcel.

[16] At this juncture, I am of the view that such amendment and substitution of LG-30 by the defendant was meant for expedient and necessary purpose since the building plan had been approved by MPPJ and the original LG-30 is no longer in existence since it had already been replaced by 'Switch & Meter Room' and staircase and cannot be used anymore for the parcel. Therefore based on cl 10.1 the building plan is subject to any amendments, variations, modifications and adjustment the position of LG-30 would include changing of its position and permits the defendant to substitute the plaintiff's unit to another unit. Therefore, such amendment and substitution was meant for 'expedient or necessary' purpose and does not amounts to an unjust enrichment by the defendant or otherwise to benefit the defendant by giving ownership of LG-30 to the defendant.

[17] Based on the above clear terms, the defendant has a right to amend, vary, substitute, reconstruct and/or in any manner deal with the parcel unit without the need to seek consent from the plaintiff. On the same footing the plaintiff shall accept any changes, variation, modification and any adjustment of the parcel as the position and description of the parcel are not guaranteed to be correct.

[18] The plaintiff is aware of the change in the parcel number and the location as he had received the notice of assessment from MPSJ which is for the parcel bearing LG-29 address. In fact plaintiff had paid the assessment tax accordingly provided by MPSJ that shows payment had been made. This clearly shows that the plaintiff is well aware that the parcel is located at LG-29 address, which is LG-29 in the amended building plan. The plaintiff also has duly signed the letter of offer dated 20 August 2015 (exh CJY8 of affidavit in support) and has agreed to sell the parcel to the defendant. Even though the sale of the parcel from the plaintiff to the defendant did not transpire, the plaintiff has already admitted and recognised the parcel is located at LG-29 address. Even though some of the defendant's correspondences and documents referred to 'LG-30', but it was referred to as the provisional parcel number for the purpose of identification and consistency when the defendant deals with the plaintiff and other relevant parties in relation to the parcel as described under the SPA. From the above facts, I am in the agreement with the defendant that the re-numbering or re-designation of LG-29 is just for identification purposes and of no issue. For this the defendant refers to the case of *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 at p 410 where the Supreme Court held:

> In our view, the correct approach would be to took at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer

A a question of words but substance (see *Woo Yew Chee v Yong Yong Hoo*; and *Addiscombe Garden Estates Ltd v Crabbe*).

The defendant also refers to the case of *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Sdn Bhd* [2010] 1 MLJ 329 at p 339 where it was held that:

> It must be emphasised that the court is not bound by the labels used by the parties. The law requires the court to assess the true meaning and effect of the transactions contemplated by the parties.

[19] The allocation of LG-29 also gives an advantage to the plaintiff since LG-29 is measuring approximately 920 sqft compared to the unit purchased by the plaintiff at 903 sqft (only a minor difference of less than 2%) of which the plaintiff need not provide additional costs for the difference. The plaintiff is not bona fide when claiming LG-30 which is a bigger unit measuring 1272 sqft and for this I am also of the view that it is an unjust enrichment on the part of the plaintiff.

[20] The case of *Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor* [2011] 7 MLJ 52 was referred which involved the same defendant (Couture Homes Sdn Bhd) and one of the purchases in the same project, the same amended building plan and the same contract clauses in the sale and purchase agreement. The High Court has decided in favour of the defendant and on appeal was affirmed by the Court of Appeal.

[21] It is a settled law that parties are bound by the terms of the contract that they have entered into. In this present case, the defendant has fulfilled its contractual obligation under the contract by giving LG-29 with almost similar size to the plaintiff after the building plan has been amended subsequent to the signing of the SPA.

[22] Based on the aforesaid reasons, I find that the plaintiff's claim is frivolous or vexation, do not disclose any reasonable cause of action and/or is an abuse of the court's process. The plaintiff's action is obviously unsustainable. The defendant's application is allowed with costs of RM5,000.

Defendant's application allowed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar